MYDIN MEERASAHIB v. SULTAN ALLUADIN & SONS.

[O. C. J. (Bostock Hill J.) October 1, 1948]

[Penang — Civil Suit No. 2 of 1948]

Damages — Claim for damages for sinking of tongkang — Res ipsa loquitur — Defence of inevitable accident.

In this case the plaintiff sued the defendants for damages for the loss by sinking of his tongkang. The evidence established that a particular sling-load of about 40 angle-irons fell into the tongkang from a height of at least 25 feet while or before being lowered and this caused the tongkang to sink.

Held: (1) the doctrine of *res ipsa loquitur* applied in this case and the onus was on the defendants of proving inevitable accident; (2) on the facts it was clear that there was negligence either in the packing or lowering of the angle-irons and therefore the defence of inevitable accident failed.

Cases referred to :—

(1) *The Merchant Prince* (1892) P. 189.

(2) *The Marpesia* (1873) L.R. 4 P.C. 220.

(3) *The Schwan — The Albano* (1892) P. 434.

(4) *Fawkes v. Poulson & Son* (1892) 8 T.L.R. 725.

CIVIL SUIT.

E. A. de Buriatte for the plaintiff.

R. D. Hume for the defendants.

Bostock Hill J. : — In this case the plaintiff is suing the defendants for damages for the loss by sinking of his tongkang P. 1259 on 31st October, 1947.

The defendants were the firm of stevedores unloading the s.s. "Empire Rani" anchored in Penang roads and plaintiff's tongkang was tied up alongside the "Empire Rani" opposite to No. 6 hatch. Plaintiff's tongkang had been chartered by agents of the consignees of the cargo. The after compartment of the tongkang had been filled with cargo (about 45 tons) and at the time of the accident angle-irons about 16 feet long were being unloaded into that part of the tongkang (almost amidships) between the cross-thwart and the mast.

The evidence established quite clearly that a particular sling-load of about 40 angle-irons fell into the tongkang from a height of at least 25 feet while or before being lowered.

The bottom of the tongkang was so seriously damaged that the tongkang sank in a few minutes.

The defendants, whose employees were doing the "packing" and "slinging" of the cargo and were managing the winches used in hoisting and lowering it, pleaded in their defence "inevitable accident" caused by a rough sea, the wash from a passing Butterworth ferry and the behaviour of the plaintiff's tongkang. They also pleaded that the plaintiff's tongkang was not structurally suitable for taking angle-irons and by reason thereof the tongkang was damaged and sunk.

When asked for "Particulars" of the defence the following were supplied by the defendants on the 8th March, 1948 :—

Particulars.

1. Particulars of inevitable accident are given in paragraph 2 of the Defence e.g. caused by a rough sea, the wash from a passing Butterworth ferry.
2. By reason of such sea and wash the tongkang could not be kept stationary during the process of unloading.
3. The hull of the tongkang was not provided with inner planks rendering the same unsuitable for taking heavy loads.
4. The plaintiff's servants or servant in the tongkang failed to control the sling when it was being lowered into the lighter and permitted the same to strike the side of the ship and thereby causing the irons to fall into the bottom of the said tongkang.

No. 4 was later abandoned but it is to be noted that defendants there referred to the "sling" striking the side of the ship. No evidence was given of this but two witnesses for the defence stated in evidence that the sling and its load of angle-irons struck the mast of the tongkang and that that was the cause of the angle-irons slipping out of the sling and falling. This striking of the mast was denied by plaintiff's witnesses and, in view of its very late introduction into the defendants' case I am very doubtful as to whether it actually happened.

Although the Particulars (Nos. 1 and 2) stated that the inevitable accident was caused by the rough sea yet the only evidence called by the defendants to that effect was the rather half-hearted evidence of D.W. 2, defendants' serang or mandor. He stated that there were moderately high waves and that the tongkang was lightly tossing — not enough to interfere with the unloading. It is to be remembered that it already had over 45 tons of cargo in it and that would tend to make it "steady".

I am satisfied on the evidence as a whole that the sea was calm and that no passing ferry-boat or other steamer caused the tongkang to be disturbed noticeably by its "wash".

I also find from the evidence as a whole that the said tongkang was in reasonably good condition (after having had very considerable repairs done to it in 1946).

Exact evidence as to the weight of the 40 angle-irons in the sling is lacking but from the evidence given by both parties and the statement that each of the angle-irons could be carried but not easily handled by one man I am satisfied that the total weight would be between 1½ and 2 tons.

These fell, first 1 or 2, and then the remainder into the tongkang from a height of at least 25 feet. Mr. Hatcher, the Assistant Harbour Master who gave evidence for the plaintiff (P.W. 2), said that if one 16 foot angle-iron ¼" thick fell from 30 feet it would even crash through ½" steel plating. He also said that if 1 or 2 (even 1) angle-irons fell vertically from a height of 30 feet on to the bottom of a tongkang he would expect them to go through if the tongkang was a normal one complete with inner skin.

There was much evidence called about the presence or absence of a complete inner skin in the tongkang P. 1259, and I am satisfied that she had floorboards and an inner skin most, if not all, of the way up her sides.

I find that the P. 1259 was in normally good condition and that this great weight of angle-irons falling from a height of at least 25 feet were bound to crash through the bottom of a normal tongkang of the kind used and of which a model was exhibited in Court, Exhibit P. 3. Evidence was given by P.W. 6 as to the sinking of another tongkang P. 714 by angle-irons falling into it while being unloaded.

The substantial point of the case therefore lies in the defence of "inevitable accident". Should the slipping of the load in the sling and then the fall of the whole of the load be ascribed to "inevitable accident," or was there negligence in the packing, slinging or managing of the sling-load by the defendants?

Mr. de Buriatte for the plaintiff based his case on the legal maxim *res ipsa loquitur* and Mr. Hume his defence on "inevitable accident" and called evidence to show that the defendants exercised ordinary care, caution, and skill. As the packing, dunnaging, and general management of the sling-load was done entirely by defendants' employees it was clearly impossible for plaintiff to give evidence about it except as to the movement of the sling-load in the air. Plaintiff's witnesses (P.W. 7 and P.W. 9) denied that the sling-load struck the mast of the tongkang and in view of the fact that this suggestion was not made by the defence until after the evidence of the ship's Chief Officer (F. G. Rogers) was taken "*de bene esse*" on 2nd April, 1948, I feel very doubtful as to whether the sling-load did strike the mast. If it did I am of opinion that it constituted negligence on the part of the mandor and/or winchman who were controlling the load and who were the defendants' employees.

As mentioned above I am quite satisfied that the sea was calm and that the tongkang, already more than half loaded, was steady.

If the tongkang was caused to rock or surge by the wash of a passing ship, and there is no evidence of this, then it would have been the defendants' duty to wait till she was at rest again before lowering the load, it being acknowledged by all parties that unloading angle-irons requires very considerable care because of their liability to slip.

Is it therefore a case in which "*res ipsa loquitur*" applies, or are the defendants able to avoid liability by reason of the evidence they called to the effect that due care, skill and caution were exercised?

I am of opinion that in the first instance the maxim *res ipsa loquitur* does apply, and puts on the defendants the onus of proving "inevitable accident". As explained above the whole of the unloading was in the hands of defendants and under their control, and it would require very strong evidence to show that it was due to inevitable accident that the whole load of 40 angle-irons weighing at least 1½ tons should come crashing down from at least 25 feet into the tongkang.

Beven on Negligence 4th Ed., page 126 sums up the position as follows :—

> There must be reasonable evidence of negligence; and the mere occurrence of an injury is sufficient to raise a *prima facie* case:
>
> (a) When the injurious agency is under the management of the defendant;
>
> (b) When the accident is such as, in the ordinary course of things, does not happen if those who have the management use proper care

and later, at page 1294, when discussing the defence of inevitable accident, the learned author cites the judgment of Fry L.J. in *The Merchant Prince*[1] :—

> The burden rests on the defendants to shew inevitable accident. To sustain that the defendants must do one or other of two things. They must either shew what was the cause of the accident, and shew that the result of that cause was inevitable; or they must shew all the possible causes, one or other of which produced the effect, and must further shew with regard to every one of these possible causes that the result could not have been avoided. Unless they do one or other of these two things, it does not appear to me that they have shewn inevitable accident.

Fry L.J. at page 190 in the same judgment also adopts the definition of inevitable accident used in *The Marpesia*[2] where it was laid down that an inevitable accident is one which could not possibly be prevented by the exercise of ordinary care, caution, and maritime skill. This definition is again cited with approval by Lopes L.J. in *The Schwan — The Albano*[3] where the learned Lord Justice also points out that there is no distinction as regards inevitable accident between cases which occur on land and those which occur at sea.

In the present case the defendants are unable to prove with certitude that the cause of the accident was that the sling-load struck the mast of the tongkang. If it did, then, as stated above, I think it showed negligence on the part of the defendants; if it did not, the only remaining question is as to whether they have discharged the burden put upon them of showing that the accident could not have been prevented by the use of ordinary skill, care, and caution in the "packing and "slinging" of the load.

It is necessary to look at the evidence on this point. There was substantial agreement from all witnesses as to the usual method of packing, dunnaging and securing the load of angle-irons in the sling.

Mr. L. A. Hatcher (P.W. 2), Assistant Harbour Master, Penang, stated the method of using one sling as described was a safe one if the angle-irons were properly packed and slung, but, he added, if an angle-iron slips out without the load striking anything it would be due to bad packing and/or slinging. He also stated that, in 20 years' experience he had seen only 4 such accidents and they were during the War period when stevedores were somewhat inexperienced.

Mr. J. H. Evans (P.W. 3), Superintendent of the Penang Harbour Board Ferry Service, agreed with Mr. Hatcher on the whole and stated that in 12 years' experience of working cargo he had only seen angle irons slip out twice, once in South Africa and once in Australia. He also stated that if angle-irons do slip it is due to inefficient "slinging" i.e. to not "hammering" the sling or to insufficient dunnage being used.

On the other hand Capt. R. W. Emmerson (called by the defence), a Master Mariner of 20 years' experience and now a Traffic Superintendent under the Penang Harbour Board stated that it frequently happens that angle-irons slip out and that he has had experience of their so doing "dozens of times" in Singapore. He added that very rarely the whole lot fall, generally only 1 or 2. He also stated in his opinion even if all reasonable precautions are taken 1 or 2 angle-irons might slip out. The one-sling method is generally used as it is quicker, though not so safe as the two-sling method which would take 50% longer and would necessitate the employment of extra men. It is to be observed that the "sling and snotter" method (a variant of the two-sling method) was used for unloading the remainder of the angle-irons after the tongkang was sunk. He thought that 40 to 50 of such angle-irons was a large load and suggested that 20 to 30 would be a reasonable load. Finally (and this is important) he conceded that if the whole load fell out almost simultaneously (as in this case) it would be a sign of something wrong with the packing and slinging. I formed the opinion that this witness somewhat exaggerated the liability to accident in the unloading of angle-irons.

Mr. Hume cited the case of *Fawkes v. Poulson & Son*[4] as being a case very much in point. Unfortunately it is somewhat scantly reported as to the facts, and the facts appear to be very different from those in the present case. In that case the Court of Appeal decided that the one bale could not have been prevented from slipping out by the use of reasonable care though it might have been possible to avoid the accident if the lowering of the bales had been conducted with all the care that would be applied to a scientific experiment. In the present case I am satisfied, by the fact that the *whole* load (and not merely 1 or 2 angle-irons) fell out, that the packing and/or slinging of the load had been negligently done and that reasonable care had not been used.

Thus I think Mr. Hume is in this difficulty. If the sling-load struck the mast then in my opinion, in the circumstances which I have found to have existed at the time of the accident, that constituted negligence on the part of the defendants' winchman and/or mandor; if the load did not strike the mast then the "packing" (including the "dunnaging") and/or the "hammering" of the sling was negligently performed. It is also, of course, possible that both acts of negligence occurred.

The unloading of angle-irons is on the evidence clearly somewhat dangerous work but that is all the more reason for proper care to be taken. Even Capt. Emmerson (D.W. 1) seemed to think that if the whole load fell (as in this case) there must have been something wrong.

It was agreed by Counsel that I should hear evidence and make a finding on the issue of liability only and, in the event of my finding for the plaintiff, that the issue as to the amount of damages should be referred to the Assistant Registrar.

I accordingly give judgment for the plaintiff on his claim for damages and refer the assessment of damages to the Assistant Registrar.

Liberty to apply.

Judgment for plaintiff.